Supreme Court of the United States

OCTOBER TERM, 1920.

No. 149.

ARMOUR & COMPANY AND ARMOUR & COMPANY OF TEXAS, Appellants,

vs.

THE CITY OF DALLAS, ET AL., Appellees.

BRIEF FOR APPELLANTS.

RALPH W. SHAUMAN,
SAMUEL B. CANTEY,
FRANCIS MARION ETHERIDGE,
JOSEPH MANSON McCORMICK,
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Francis Marion Etheridge,
Counsel.

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STATEMENT.

Appellants exhibited in the District Court of the Northern District of Texas their bill of complaint (R. 1 to 33) and their amendment thereto (R. 70), whereby they sought to enjoin the City of Dallas, hereinafter designated as the City, the Texas & Pacific Railway Company, hereinafter designated as the Railway Company, the Receivers thereof and Wholesale District Trackage Company, hereinafter designated as Trackage Company, from removing from Pacific Avenue in said

City a switch track and its necessary main track connections that serves appellants' plant.

Upon a final hearing the court, declining to pass upon one of the vital issues, dismissed appellants' bill and the amendment thereto (R. 74). Appellants seasonably perfected their appeal to this court and now here prosecute same upon the following:

SPECIFICATIONS OF ERROR.

1. The court erred in dismissing plaintiffs' bill of complaint and the amendment thereto.

2. The court erred in not awarding an injunction as prayed for by the plaintiffs in their bill of complaint and the amendment thereto.

3. Plaintiffs' bill of complaint herein and the amendment thereto sets up valuable contract rights that are protected by the obligation and contract clauses of the Constitution of the United States and shows that the resultant damage that will ensue upon the commission of the threatened violation of those contract rights is incapable of ascertainment, and therefore plaintiffs are remediless except in a court of equity, and the court erred in dismissing plaintiffs' bill of complaint herein and the amendment thereto.

4. The court erred in not awarding an injunction to restrain the defendant, the City of Dallas, from complying with the contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, because said contract is invalid for that the same was never countersigned by the Auditor of the City of Dallas, and such countersigning is an essential requisite to the validity

of the contract by the express provisions of the Charter of the City of Dallas.

5. The purported contract, a copy whereof is made Exhibit "D" to plaintiffs' bill of complaint herein, is as to the defendant, the City of Dallas, invalid because not countersigned by the Auditor of the said City, and because the Street Improvement Fund was continuously overdrawn from the date of the execution of said purported contract up to May 1, 1919, the close of the fiscal year of the said City of 1918, and therefore by the express provisions of the Charter of said City the Auditor of said City was prohibited from countersigning said purported contract, and the court erred in not so holding.

6. The Street Improvement Fund being continuously overdrawn from the date of the execution of the alleged contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, to the close of the fiscal year, May 1, 1919, the Auditor of the City of Dallas was by the express provisions of the Charter of said City prohibited from countersigning said purported contract, and after the close of the fiscal year, to-wit, May 1, 1919, said contract created an indebtedness and same was void because no provision for the payment of the hundred thousand dollars which the City of Dallas obligated itself to pay to the Wholesale District Trackage Company was provided for, and therefore said contract for the payment of said sum by the said City was void by reason of Section 5 of Article II of the Constitution of the State of Texas which provided that "no debt shall ever be created by any city unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon," and the court erred in not so holding.

7. The court erred in permitting the witness, R. V. Tompkins, Auditor of the City of Dallas, to testify that, in view of his statement of the accounts of the City, he is ready, if the injunction sued out in the State court is removed, to countersign, as Auditor, the contract, a copy whereof is made Exhibit "D" to the plaintiffs' bill of complaint herein, because the said R. V. Tompkins had testified that the hundred thousand dollars contracted to be paid by the defendant, the City of Dallas, to its co-defendant Wholesale District Trackage Company was chargeable to the Street Improvement Fund, and had further testified that the Street Improvement Fund account had been continuously overdrawn from the time of the execution of said purported contract up to the time the said witness testified, because by Section 42 of Article XIV of the Charter of the City of Dallas it is provided that "whenever the contract charged to any appropriation equals the amount of said appropriation, no further contract shall be countersigned by the Auditor."

8. The court erred in permitting the defendants' witness, J. E. Lee, to testify as follows: "I notified Mr. Short that my desire and policy was not to put any more tracks on Pacific Avenue; that there hadn't been any granted for some time and that it was a cherished hope of the people of Dallas some time to remove those tracks that were there," because all oral negotiations leading up to were merged in the subsequent written contract evidenced by the ordinance granted by the City of Dallas to the Texas & Pacific Railway Company, a copy whereof is made Exhibit "C" to plaintiffs' bill of complaint herein.

9. The court erred in permitting the defendants' witness, J. E. Lee, to testify as follows: "Mr. Short and

myself had a great many conversations. I couldn't recall the words, but I remember giving him that warning about the proposition. The warning was that we wanted to feel free to remove all tracks from Pacific Avenue," because all oral negotiations leading up to were merged in the subsequent written contract evidenced by the ordinance, a copy of which is made Exhibit "C" to the plaintiffs' bill of complaint herein. (R. 75 to 77.)

SUMMARY OF APPELLANTS' BILL, THE AMENDMENT THERETO AND THE UNDISPUTED EVIDENCE IN SUPPORT THEREOF.

In 1872 the Railway Company, under an ordinance of the City of Dallas authorizing it so to do, built its main line on Pacific Avenue in said City and has operated the same thereon ever since, (R. 78). By a valid ordinance approved April 14, 1890, the Railway Company, for valuable considerations, was granted the right to construct a double track on Pacific Avenue and to maintain the same for fifty years thereafter, (R. 22 to 24). (Appellants contend that the contracts evidenced by said ordinances are protected by the due process and obligation clauses of the Constitution.)

Pacific Avenue is 80 feet wide, is devoted to industrials and there are, and for years past have been, many service tracks put in and operated thereon under municipal authority. On April 4, 1912, Armour & Company of New Jersey, hereinafter designated as appellant, its co-appellant being merely a lessee of the plant hereinafter mentioned, desirous of building a plant that would be served by a switch track, conditionally contracted for the purchase of a lot on the northwest corner of Harwood

Street and Pacific Avenue. The contract of purchase was expressly conditioned upon appellant's securing from the City a franchise for a switch from the main line on Pacific Avenue to the lot in question, as well as an agreement by the Railway Company to construct, maintain and operate such switch (R. 80; 5 and 6). The officials of both the Railway Company and the City knew that appellant had contracted for said lot upon the conditions stated, (Ev. Short, R. 80 to 84). The city authorities inspected the premises and assured appellant's representative that if it would purchase the lot and dedicate certain specified portions thereof to the public for street purposes, an ordinance would be passed granting the Railway Company the right to construct and operate the desired switch track, (Ev. Short, R. 80 to 84; Ev. Jerome, R. 87). Everman, the superintendent of the Railway Company, also inspected the premises and assured appellant's representative that, in the event the franchise should be granted, the Railway Company would accept it and would construct, maintain and operate the switch track in accordance therewith (R. 87). Relying upon such assurances, appellant purchased the lot, paying $50,000 therefor, and, by deed drawn by the City Attorney, made the irrevocable dedication as required by the City as a condition precedent to the granting of the franchise (R. 82 and 83). But for such assurances appellant would not have consummated the conditional contract of purchase, and that fact was known to both the Railway Company and the City (R. 87).

In pursuance of the agreement so had by and between appellant, the City and the Railway Company, and in consideration of the irrevocable dedication so made by appellant, the City, on July 30, 1912, approved an ordi-

nance granting the Railway Company the right to construct and operate the switch track in question (R. 24 to 26). Said ordinance was granted for a period of twenty years and will not expire until July 30, 1932. Said ordinance (R. 24 to 36) proclaims the fact that the consideration therefor emanated from appellant and that it was the one to be benefited thereby.

Section 4 of said ordinance (R. 25 and 26), reads:

"That **in accordance with the agreement heretofore made between the City of Dallas and Armour & Co., the owners of a certain lot located on the north side of Pacific Avenue,** and more particularly located on the northwest corner of Pacific Avenue and Harwood Street and extending back to Live Oak Street, **which switch track is intended to serve said property, it is mutually understood and agreed that as a further consideration for this grant the grantee shall obtain from the said Armour & Co. or the said Armour & Co. shall dedicate to public use sixty-four square feet of land located at the southeast point of its said lot where the same forms a corner of Harwood and Pacific Avenue, and shall likewise dedicate to public use for street purposes thirty-five square feet off the northeast corner of its said lot where the same forms the southwest corner of Harwood Street and Live Oak Street,** it being the purpose of the said dedication to round the corners at such points **and to dedicate such property for street purposes,** and it being understood that it requires the amount of square feet herein stated to round off said corners—all of which more fully appears from map on file in the office of the City Engineer of the City of Dallas. That the dedication of said property shall be made by the said Armour & Co., **whose property is** [to be] **served by said switch,** before the final acceptance of this ordinance by the grantee herein. That in the event the said Armour

& Co. should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and privileges granted under this ordinance, by resolution or otherwise."

The dedication deed, contemporaneous with and therefore a part of the side track ordinance, recites that it was made in **"consideration of the granting of said franchise for such switch track to the said Texas & Pacific Railway Company for the use and benefit of Armour & Company in thus providing such switch facilities to it"** (R. 82 and 83). (Appellant maintains that it is a party to said ordinance, that it paid a valuable consideration therefor by irrevocably conveying to the City a part of its said lot for street purposes, and that the tripartite contract between it, the City and the Railway Company, as evidenced thereby, is protected by the due process and obligation clauses of the Constitution.) The Railway Company accepted said ordinance, put in the switch, and thereupon appellant, encouraged so to do by both the City and the Railway Company, began and on or about February 12, 1913, completed a building on said lot at a cost of $79,692.27. Said building, consisting of a basement and three stories on Pacific Avenue and two stories on Harwood Street, is a reinforced concrete structure, monolithic in character. It is solely adapted to the peculiar requisites of appellant's business for which it was designed, and is neither adapted nor adaptable to any other kind of business. It would cost $137,870 to duplicate that building now (Ev. of Quinn, R. 86). Appellant leased the said plant to its co-appellant, Armour & Company of Texas, and the business conducted thereat has been and continues to be profitable. The annual volume

of the business is about $2,000,000. The business can not be conducted without a service track and the removal of the tracks from Pacific Avenue will put the plant out of commission, render the said building valueless and interrupt the profitable business that is being conducted thereat, and appellees know these facts (R. 87 and 88). In the conduct of its business appellant Armour & Company of Texas requires and has been and is now being furnished 600 to 650 cars per annum, (R. 87).

In disregard of the rights of appellants, appellees, upon a consideration satisfactory to themselves, voluntarily proposed the execution of a contract providing for the removal from Pacific Avenue of the main tracks and all service tracks except the one that serves Fulton Bag & Cotton Mills (R. 26 to 33). The contract so proposed was on August 23, 1918, without notice to appellants, presented to the Board of Commissioners of the City which, being in session and exercising legislative power, approved an ordinance or resolution authorizing the execution thereof by the Mayor; and, solely in pursuance of that contract, appellees, co-operating together, threaten to remove and, unless restrained from so doing, will remove from Pacific Avenue the main tracks and the switch track that serves appellants' plant (R. 85 and 86; 13 to 15). Such action on the part of the Railway Company and its Receivers is not the result of compulsion, but is solely because of their said voluntary contract (Ev. Lancaster, R. 109), and neither party to said contract, the consummation of which will necessarily strike down appellants' fixed rights, has made to either of appellants any offer or compensation whatever.

In pursuance of said ordinance or resolution of August 23, 1918, the Mayor, acting for the City, executed the said contract.

Section 42 of Article XIV of the Charter of said City (R. 79) provides that:

> "No contract shall be entered into by the Board of Commissioners until after an appropriation has been made therefor, nor in excess of the amount appropriated, and all contracts shall be made upon specifications, and no contract shall be binding upon the City unless it has been signed by the Mayor and countersigned by the Auditor and the expense thereof charged to the proper appropriation; and whenever the contract charged to any appropriation equals the amount of said appropriation no further contract shall be countersigned by the Auditor."

The contract in question provides for the payment by the City to the Trackage Company of $100,000. Said contract was not countersigned by the Auditor, and the Street Improvement Fund out of which the $100,000 was contracted to be paid was continuously overdrawn from July 1, 1918, to May 1, 1919, which closed the fiscal year of 1918 (Ev. Tompkins, R. 131), and, therefore, the Auditor could not countersign said contract without incurring criminal liability.

THE ALLEGED PUBLIC INTEREST.

Appellees seek to interpose an alleged public interest to prevent specific performance of appellants' contract rights and evidence was adduced to show that the running of through freight and passenger trains over Pacific Avenue operated detrimentally to the public. There is, however, no evidence whatever in the record to show

that the maintenance and operation of the switch track in question, with its necessary main track connections, will injuriously affect any rights of the public. The record affirmatively shows that the switch track does not cross, but lies entirely west of Harwood Street, (Ev. Tennant, R. 88), and that Harwood and Pearl and the streets intervening are the principal thoroughfares that cross Pacific Avenue, none of which are traversed by the switch track (R. 120). The contract in pursuance of which the removal of all the tracks from Pacific Avenue is threatened (R. 26 to 33) shows that the Railway Company is to run its trains over a belt line constructed by the H. & T. C. Ry. Co.

It is not the object or purpose of this suit to enjoin the Railway Company from doing that, nor to compel it to continue running its trains over Pacific Avenue. The sole object of the bill is to enjoin appellees from discontinuing or taking up the switch track west of Harwood and its necessary main track connections.

During the pendency of this cause in this court, all parties entered into an agreement on February 16, 1920, which is made a part of the record herein and which reads:

> "It is agreed by and between the parties to the above entitled and numbered cause that, during the pendency of the appeal herein, the switch track serving appellants' plant shall be maintained and operated, and that all other tracks on Pacific Avenue west of appellants' plant may be removed and that all other tracks on Pacific Avenue east of appellants' plant, not necessary for the maintenance and operation of said switch track may be removed, and that such removal shall not be held to constitute a contempt of this Court, and appellants' prayer for injunctive relief is

hereby limited to the removal of the said switch track and so much of the main track east of appellants' plant as may be essential to the maintenance and operation of the said switch track, and further, the connections of said switch track with the main track may be changed in such a way as may best suit the convenience of the appellees; such change, however, if made, to be so made as not to interrupt or suspend the maintenance and operation of said switch track."

Appellants require the switching of 600 to 650 cars per annum, or less than two cars per day, and there is no basis in the testimony (R. 77 to 137) for any contention that such restricted use of that part of Pacific Avenue whereon the switch track is located will injuriously affect the rights of the public. On the contrary, the contract expressly provides that "the spur track serving the Fulton Bag & Cotton Mills extending along the southern boundary of Pacific Avenue" shall not be removed, but shall be continued to be operated till Jan. 1, 1923, (R. 29). (Appellants, therefore, maintain that there exists no element of public interest to prevent the specific performance of their rights acquired upon a valuable consideration under the ordinance of July 30, 1912, R. 24 to 26).

The threatened removal of the tracks from Pacific Avenue is occasioned solely by what appellees deemed an advantageous contract. Lancaster, formerly the Receiver, testified: **"Yes, as a matter of fact, what was contemplated to be done is absolutely the result of contract, on which, under the circumstances, I deem advantageous to the railway company,"** (R. 109).

The Receivers of the Railway Company did not repudiate, but ratified appellants' contract with the City

for the switch track, and but for the general scheme in pursuance of what the Railway Company deemed an advantageous contract the receivers would continue the switch track service to appellants' plant. Lancaster testified: **"Of course, had there not been a program to take the main tracks off of Pacific Avenue, I would not, when I was Receiver of the Texas & Pacific Railway Company, discontinue the switch track service to the Armour plant. The proposition to take up the switch that serves Armour's plant is only incidental to the general scheme of taking up all the tracks."** (R. 112).

The City never passed any ordinance requiring the removal of any tracks from Pacific Avenue. On the contrary, the City, on April 7, 1915, cited the Railway Company to appear and participate in taking testimony as to whether a public necessity existed requiring the Railway Company to depress or elevate its tracks. On April 7 the hearing was continued to June 7, and on June 7 it was continued to June 30, and on June 30 it was continued indefinitely without action (R. 98) and no further action whatever was had by the City until the passage of the resolution of August 23, 1918, authorizing the execution of the contract between the City, the Railway Company, its Receiver and the Trackage Company (Ev. Peevey, City Secretary, R. 132 and 133). It is obvious from a perusal of the testimony (R. 78 to 134) that the scheme for the removal of the tracks from Pacific Avenue was inaugurated by real estate promoters to subserve a selfish rather than a public interest. None knew that fact better than Lancaster, formerly one of the Receivers. On

January 22, 1918, appellant wrote to Lancaster as follows:

> "We understand that there is again some agitation with regard to eliminating the railroad company's tracks from Pacific Avenue in Dallas, Texas. **Such action would ruin our investment on your rails and, we have no doubt, would be a serious damage to your company.**" (R. 110 and 111.)

On January 25, 1918, Lancaster replied to appellant, saying:

> "There has, as you know, been agitation pro and con concerning the removal of the tracks on Pacific Avenue. **This entire subject is brought about through the agitation of certain interests in Dallas.**" (R. 111.)

"Certain interests" plainly signify a selfish interest as contradistinguished from the public interest. The committee which disseminated the removal propaganda afterwards merged into the corporate existence of the Trackage Company, and in an effort to obtain funds with which to consummate the project, wired to H. L. Bromberg, on February 1, 1918, as follows:

> "Track removal project at extremely critical stage. We can't believe **property owners** will allow this plan to fail. Unless few remaining **owners** will subscribe their part, committee must admit failure, **which means enormous loss to interested property owners.**" (R. 122.)

POINT I.

The City of Dallas was expressly authorized by its charter to grant the franchise for the switch track to serve appellants' plant.

Art. II, Sub. 18 of Sec. 8, Charter of the City of Dallas, (R. 78).

POINT II.

Article I, Section 17 of the bill of rights of the Constitution of the State of Texas, providing that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof," does not authorize the repeal of an ordinance except for causes judicially ascertained.

Mayor v. Houston Street Ry. Co., 83 Tex. 548.

POINT III.

The right of control reserved by Article I, Section 17 of the bill of rights of the Texas Constitution can be exercised only by the Legislature, and has not been and can not be delegated to the City of Dallas.

City Railway Co. v. Citizens' Ry. Co., 166 U. S. 557, 563.

POINT IV.

The circumstances surrounding the grant of the switch track ordinance negative an intention on the part of the City of Dallas to give, or on the part of appellant to accept, a mere revocable right.

Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 585; Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58.

POINT V.

The reservation of the right to "amend or alter," contained in Section 2 of the switch track ordinance, does

not authorize the City of Dallas to repeal or annul the ordinance.

Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58;
C. M. & St. P. Ry. Co. v. Minnesota Central Railroad Co., 14 Fed. 525;
New Orleans v. Great Southern Telephone & Telegraph Co., 40 La. Ann. 41;
2 McQuillin, Mun. Corp., Sec. 826, pp. 1769-1770;
4 McQuillin, Mun. Corp., Sec. 1661, pp. 3494 to 3497.

POINT VI.

The proviso in Section 3 of the switch track ordinance "that in the event the said railway company shall be required to abandon, elevate or to place in subways said main tracks on Pacific Avenue, then and in that event this franchise shall be subject thereto," does not authorize the City of Dallas, acting alone or in concert with its co-appellees herein, to commit a breach of its previously existing valid contract with appellant by the voluntary removal of the tracks from Pacific Avenue.

Mattingly's Heirs v. Read, 60 Ky. 524, 526;
Kennedy v. Falde, 4 Dak. 319;
U. S. v. San Francisco Bridge Co., 88 Fed. 891, 893;
Federal Lead Co. v. Swyers, 161 Fed. 687, 692, 693.

POINT VII.

The settled rule in Texas is that a third party for whose benefit a contract is made may maintain an action to enforce it.

McCown v. Schrimpf, 21 Tex. 22;
Western Union Telegraph Co. v. Adams, 75 Tex. 531;
Mathonican v. Scott, 87 Tex. 396;
Evans v. G. C. & S. F. Ry. Co., 28 S. W. 903;

Kitchen v. Dallas Brick Co., 29 S. W. 402;
Hales v. Peters, 162 S. W. 386;
Allen v. Traylor, 174 S. W. 923;
Roberts v. Abney, 189 S. W. 1101;
T. F. & Bonding Co. v. Rosenberg School District, 195 S. W. 298.

POINT VIII.

The settled rule of decision in Texas to the effect that a third person may maintain an action on a contract made for his benefit is a fixed rule of property right which this court will follow.

Gibson v. Victor Talking Machine Co., 232 Fed. 225, 231 and 232;
Hendrick v. Lindsay, 93 U. S. 143;
National Bank v. Grand Lodge, 98 U. S. 123;
Austin v. Seligman, 18 Fed. 519;
Weldon National Bank v. Smith, 86 Fed. 398;
71 Am. St. Rep. 206, note.

POINT IX.

The rule in the Federal courts, as well as in the Texas courts, is that a third person may maintain an action on a contract when the contract shows that he furnished the consideration and that it was made for his benefit as its object.

House v. Houston Water Works Co., 88 Tex. 233;
Hendrick v. Lindsay, 93 U. S. 143;
National Bank v. Grand Lodge, 98 U. S. 123;
Willard v. Wood, 135 U. S. 309;
Constable v. National Steamship Co., 154 U. S. 51, 73 and 74;
German Alliance Ins. Co. v. Home Water Co., 226 U. S. 220, 230, 234;
Austin v. Seligman, 18 Fed. 519, 522.

POINT X.

Appellant became a party to the written contract evidenced by the switch track ordinance by its acceptance of and compliance with the requirement thereof.

Martin v. Roberts, 57 Tex. 564, 567 and 568;
Campbell v. McFadin, 71 Tex. 28, 31 and 32;
Baird v. Erie Ry. Co., 129 N. Y. S. 329;
American Malleables Co. v. Bloomfield, 83 N. J. L. 728;
Atlanta W. P. R. Co. v. Camp, 130 Ga. 1.

POINT XI.

The valid contract evidenced by the switch track ordinance is protected by the due process and obligation clauses of the Constitution, and it was not within the power of the City of Dallas thereafter to abrogate the same by the ex parte resolution of August 23, 1918.

Citizens St. R. Co. v. City Ry. Co., 56 Fed. 746; 64 Fed. 647; 166 U. S. 557;
New Orleans Water Works Co. v. Rivers, 115 U. S. 674;
Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 583, 584;
Ross v. Oregon, 227 U. S. 150, 163;
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

POINT XII.

Appellant is entitled to have its contract rights specifically enforced by the issuance of an injunction to preserve the status quo.

Owensboro v. Cumberland Telephone Co., 230 U. S. 58;
City of Emporia v. A. T. & S. F. Ry. Co., 94 Kansas 718;

Taylor v. Florida East Coast Ry. Co., 54 Fla. 635;
I. & G. N. Ry. Co. v. Anderson County, 106 Tex. 60;
I. & G. N. Ry. Co. v. Anderson County, 246 U. S. 424;
H. & T. C. Ry. Co. v. City of Ennis, 201 S. W. 256;
Harper v. Virginian Ry. Co., 76 W. Va., 788;
McKell v. C. & O. Ry. Co., 186 Fed. 39;
American Malleables Co. v. Town of Bloomfield, 83 N. J. L. 728;
Southern Ry. Co. v. Franklin & P. R. Co., 96 Va. 693;
Raphael v. Thames Valley Ry. Co., 2 L. R. Chan. App. Cas. 147;
Greene v. West Cheshire Ry. Co., L. R. 13 Eq. Cas. 44;
Jacksonville Ry. Co. v. Hooper, 160 U. S. 527;
Union Pac. Ry. Co. v. C. M. & St. P. Ry. Co., 163 U. S. 564; 600;
Atlanta W. P. R. Co. v. Camp, 130 Ga. 1;
Columbus Ry. & Power Co. v. Columbus, 249 U. S. 399.

POINT XIII.

Appellants are entitled to the undisturbed use of the building for the purposes for which it was erected and dedicated, and it is no defense to indulge the speculation that the removal of the tracks may enhance the value of the lot.

Railway Co. v. Fifth Baptist Church, 108 U. S. 317.

POINT XIV.

The City of Dallas has not, under its charter or otherwise, the right to require the Railway Company to abandon its tracks on Pacific Avenue or to remove them therefrom.

Sub. 28a, Sec. 8, Art. II, Charter of the City of Dallas (R. 78 & 79).

POINT XV.

The agreement entered into between the railway company and appellant was, at the time the receiver for the railway company was appointed, a valid and subsisting contract which fixed the obligation and determined the rights of the respective parties; and the receiver was clothed with no power to do any act which might impair the obligation of that contract.

Wolf v. McNulta, 178 Ill. 85;
Chem. Nat. Bank v. Hartford Deposit Co., 156 Ill. 522;
Same case, 161 U. S. 1.

POINT XVI.

The contract, a copy whereof is made Exhibit D to appellants' bill, in virtue of which the tracks are to be removed from Pacific Avenue, is void because not countersigned by the Auditor of the City of Dallas as required by the Charter of said City.

Sub. 42, Art. XIV, Charter, City of Dallas, (R. 79 & 80);
City of Bryan v. Page, 51 Tex. 532, 535;
Press Pub. Co. v. City of Pittsburg, 207 Pa. 623;
Lee v. City of Racine, 64 Wis. 231;
City of Superior v. Norton, 63 Fed. 357;
2 Dillon Mun. Corp., Sec. 790, p. 1177.

POINT XVII.

The resolution passed by the City of Dallas on August 23, 1918, is legislative and not administrative, and constitutes a state law impairing the obligation of the prior contract of the City with appellant, and is therefore vio-

lative of the due process and obligation clauses of the Constitution.

Citizens St. R. Co. v. City Ry. Co., 56 Fed. 746; 64 Fed. 647; 166 U. S. 557;
New Orleans Water Works Co. v. Rivers, 115 U. S. 674;
Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 583, 584;
Ross v. Oregon, 227 U. S. 150, 163;
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

BRIEF OF THE ARGUMENT.

The Railway Company's Receiver was not a party to the contract otherwise than by ratification. If the contract cannot be enforced against the Receiver of the Railway Company because he was not a party to it otherwise than by having ratified it, that fact afforded no justification for the dismissal of the bill as to those of the appellees who were parties to the contract and against whom it was enforcible. The fact that no obligation rested upon either of the appellants to continue to use the switch track is unimportant. Appellant performed its part of the contract by a dedication of parts of its lot to the public for street purposes, and the consideration appellant gave cannot be restored to it. The doctrine that a contract wanting in mutuality will not be specifically enforced has no application where the contract has been performed by the party seeking to enforce it. The doctrine of mutuality is applicable only to executory contracts. As to appellant, the contract was fully executed. 25 R. C. L., title, "Specific Performance," Section 36, p. 235, bottom paging, and authorities cited.

The contract evidenced by the switch track ordinance contravened no provision of the Texas Constitution or

statutes and is not subject to such arbitrary annulment as was undertaken by the City by the resolution of August 23, 1918, authorizing the Mayor to execute a contract, the necessary effect of which was to strike down appellants' vested rights acquired in good faith and upon a valuable consideration. Northern Ohio Traction Co. v. Ohio, 245 U. S. 574, 585.

The granting of the switch track ordinance, the acceptance thereof by the Railway Company and appellant's dedication deed are all parts of one and the same transaction and as such must be construed together. Baird v. Erie Ry. Co., 210 N. Y. 225.

The fact that appellant paid the consideration for the switching privileges gives it direct rights under the switching contract as being in effect and in law a direct party to that agreement. Baird v. Erie Ry. Co., 129 N. Y. Supp. 329, 343.

The formal or immediate parties to a contract are not always the persons who have the most substantial interest in its performance. Sometimes a third person is exclusively interested in its fulfilment. If the parties choose to treat him as the primary party in interest they recognize him as a privy in fact to the consideration and promise. Austin v. Seligman, 18 Fed. 519, 522.

There is a manifest distinction between covenants to establish and maintain stations for the public convenience and those to establish and maintain sidings for private use merely. The former are generally condemned as against public policy, while the latter are to be governed by the circumstances of each particular case. Whalen v. Baltimore & Ohio R. R. Co., 108 Md. 11, 18 & 19.

The contract of a railway company to construct and maintain a side track or switch for the benefit of a private

person is not against public policy when the interests of the public are not thereby injuriously affected. Taylor v. Florida East Coast R. R. Co., 54 Fla. 636; Butler v. Tifton, T. & G. R. Co., 121 Ga. 817; Scholton v. St. Louis & S. F. R. Co., 101 Mo. App. 516; Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1; Green v. West Cheshire Ry. Co., L. R. 13 Eq. Cas. 44.

The subject matter of the contract evidenced by the switch track ordinance was not foreign to the lawful purposes of the Railway Company and the ordinance was granted in the exercise of express charter powers of the City, and it is not forbidden by statute, is not otherwise illegal and should not be annulled by the courts. Taylor v. Florida East Coast R. Co., 54 Fla. 635, 649.

The burden devolved upon the appellees, in order to prevent specific performance of the contract relied upon by appellant, to establish satisfactorily that there had arisen such a conflict between the public duties of the Railway Company on one hand, and its duties under the contract on the other, as to make it impossible for it to discharge the former without entirely abandoning the latter. Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1.

Appellees signally failed to discharge that burden. The material evidence upon that issue is that of Lancaster, R. 102 to 114. Lancaster's evidence is to the effect that Pacific Avenue ascends eastward at the rate of 1.4 feet per 100 feet; that to get heavy trains over that grade they must be run at an excessive rate of speed; that more than a hundred trains are operated every twenty-four hours; that the freight trains are very long, some of them having from 70 to 80 cars, and that they are frequently stopped, obstructing the traffic, etc. (R. 105.) Such is the sum and substance of the testimony relative to the

issue of the public interest sought to be interposed between appellants' obligation and the remedy to which it is entitled.

Inasmuch as it is not the purpose of the bill to enjoin the Railway Company from running its trains over the belt line of the H. & T. C., and inasmuch as the sole purpose of the bill is to enjoin the appellees, confederating together, from taking up the switch track serving appellants' plant and its necessary main track connections, the testimony of Lancaster is wide of the mark.

The fact, if it be a fact, that the continued use of Pacific Avenue by the Railway Company by the running of a hundred heavy trains over it every twenty-four hours is incompatible with the safety and convenience of the public, constitutes no answer to the proposition that the restricted use of Pacific Avenue by the maintenance and operation of the switch track serving appellants' plant will not operate injuriously upon the public interest. There is not a scintilla of evidence in the record showing or tending to show that such restricted use of Pacific Avenue will in the least interfere with the safety or convenience of the public. Such being the state of the record, it is not conceivable that appellant should be denied appropriate remedy for the enforcement of its legitimate contract, protected, as it is, by the due process and obligation clauses of the paramount law. It is obvious that the damages incident to the removal of the switch track, which must necessarily result in rendering appellants' plant valueless and in terminating the conduct of its profitable business, are incapable of ascertainment. Appellants' equities are very great. "It contracted for the lot upon the express condition that it would not complete the purchase unless it could obtain from the City a

franchise for a switch track and an agreement from the Railway Company to accept such franchise and put in and operate the switch track. The City and the Railway Company knew this fact. The officials of both inspected the premises and those of the City assured appellant that if it would go forward with and complete its contract of purchase and irrevocably dedicate to the public for street purposes certain portions of its lot, the franchise would be granted, and the Railway Company assured appellant that in the event of the grant of the franchise it would accept the same and would put in and operate the switch track in accordance therewith. Acting upon such assurances, appellant consummated the purchase of the lot, paid $50,000 therefor and proceeded, being encouraged so to do both by the City and the Railway Company, to the construction and completion, at great expense, of a plant adapted solely to the peculiar requisites of its business. That plant cannot be operated without a service track. Thereafter the city, confederating with the Railway Company, by the ex parte ordinance of August 23, 1918, undertook to authorize the Railway Company to remove all its tracks from Pacific Avenue, including the switch track serving appellants' plant, thereby attempting to strike down, without notice or any sort of offer of compensation, the fixed and vested rights of appellant that were confessedly within the purview of the sacred protection of constitutional guaranties. Such proceeding was not only illegal, but is shocking to the conscience.

Appellees attempt to justify, or rather to escape the consequences of, the illegal act upon several pretenses. The first pretense is that of public policy, and that finds no support whatever in the record as applied to the limited use appellant seeks to make of Pacific Avenue. The

next pretense is that section 2 of the switch track ordinance reserves to the City the right at all times to "amend or alter the ordinance". The right to "amend or alter" does not include the right to strike down or destroy. If any such unreasonable intention lurked in the minds of the council that passed the ordinance, it came under the obligation of expressing it clearly and unambiguously. That pretense therefore utterly fails. Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 72; Chicago, M. & St. P. Ry. Co. v. Minnesota Central Ry. Co., 14 Fed. 525, 530; City of New Orleans v. Great Southern Telephone & Telegraph Co., 40 La. Ann. 41. The next pretense is that section 3 of the switch track ordinance provided that should the Railway Company "**be required to abandon**" its tracks on Pacific Avenue "then and in that event this franchise shall be subject thereto". Obviously this provision is wholly inapplicable because it is an undisputed fact that the City never attempted to require—much less did it ever require—the Railway Company to abandon its tracks on Pacific Avenue. At one time the City cited the Railway Company to appear and participate in a hearing to determine whether public policy required the tracks on Pacific Avenue to be depressed, elevated or removed, but that proceeding was entirely abandoned, presumably because the City determined that public policy required neither. The concluding clause of section 4 of the switch track ordinance, quoted pp. 7 and 8, *supra*, provides "**that in the event the said Armour & Company should fail or refuse to make said dedication, it is expressly understood between the parties that the City of Dallas may repeal and cancel the rights and privileges granted under this ordinance by resolution or otherwise**". The specification of one contingency which alone authorized

the City to repeal the ordinance, necessarily excluded the right to repeal it upon the happening of any other contingency. This follows under the settled maxim of *expressio unius est exclusio alterius.* This proviso contained in section 3 of the ordinance has no application because the threatened abandonment of Pacific Avenue is purely voluntary and is in pursuance of what the parties, adverse to the interests of appellant, deem advantageous to themselves. That fact was proclaimed by Lancaster when he testified: "**Yes, as a matter of fact, what was contemplated to be done is absolutely the result of contract, on which, under the circumstances, I deem advantageous to the Railway Company**" (R. 109). It is not permissible to import into the ordinance—a tripartite agreement among appellant, the Railway Company and the City—a material condition such as that it shall terminate in the event of a voluntary abandonment of the street by the Railway Company under legislative permission from either the City or the State. Such interpolation of material terms not found in the contract does violence to the established canons of construction.

The City has not and never had power to require the Railway Company to abandon its tracks on Pacific Avenue. Its power is expressly restricted by Subdivisions 28 and 28a of Section 8 of Article II of its Charter (R. 78 & 79). Thereby the power of the City is restricted to the right to require railway companies operating tracks across public streets "to reduce such track or tracks below the level of the streets intersected or occupied by such track or tracks, or to elevate such track or tracks above the level of the streets intersected or occupied by such track or tracks, and to require the company or companies owning or operating such track or tracks to

provide necessary and proper crossing for the public travel at intersecting streets" (R. 79).

The police power cannot lay hold of mere inconvenience and make it the basis of the right to repeal the switch track ordinance. Grand Trunk Western Ry. Co. v. City of South Bend, 227 U. S. 544, 554.

None of the defenses interposed to the relief prayed for by appellant, and especially as against the City, the Railway Company and the Trackage Company, can pass the test of judicial scrutiny.

The purported contract, the execution of which was authorized by the ex parte resolution of August 23, 1918, is absolutely void because not countersigned by the City's Auditor. Subdivision 42 of Article XIV of the City's Charter provides that: "No contract shall be entered into by the Board of Commissioners until after an appropriation has been made therefor, nor in excess of the amount appropriated, and all contracts shall be made upon specifications, and no contract shall be binding upon the City unless it has been signed by the Mayor and countersigned by the Auditor" (R. 79). It is an undisputed fact that the contract was not countersigned by the Auditor, and it is a further undisputed fact that the $100,00 which the purported contract obligated the City to pay was to be paid from the Street Improvement Fund and that that fund was continuously overdrawn during every month from July 1, 1918, to and including May 1, 1919, and there never was, therefore, a time when the Auditor could legally countersign that purported contract. (R. 130 to 132.) The authorities cited under point XVI are conclusive of the question.

The District Court evaded and refused to decide that issue on the ground that a taxpayers' suit had been brought in the State court by a number of taxpayers, including appellants, for the use and benefit of themselves and all other taxpayers of the City, to enjoin appellees from carrying out the contract of August 23, 1918, and because a temporary injunction had issued in that case (R. 74). Upon that issue the appellees were deprived of a hearing and that fact distinctly appears upon the face of the decree dismissing their bill, (R. 74). The proceeding in the State court was not one *in rem* and it afforded no justification for the abrogation by the court below of its constitutional function.

It is respectfully submitted that the decree of the court below should be here reversed.

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